



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

**PORT AUTHORITY
TRANS-HUDSON CORPORATION,**

Petitioner,

-against-

PATRICK FEENEY,

Respondent.

**PORT AUTHORITY
TRANS-HUDSON CORPORATION,**

Petitioner,

-against-

CHARLES T. FOSTER,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF ON BEHALF OF RESPONDENTS PATRICK
FEENEY AND CHARLES T. FOSTER**

RICHARD W. MILLER
Counsel of Record
 PETER M. J. REILLY
Attorney for Respondents
Patrick Feeney and
Charles T. Foster
 444 Main Street
 P.O. Box 230
 Islip, New York 11751
 (516) 581-8687

On the Brief:

RICHARD W. MILLER

QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans-Hudson Corporation, immune from suit in the federal courts by virtue of the protection afforded by the Eleventh Amendment?
2. Has the immunity afforded by the Eleventh Amendment been waived by or on behalf of the Petitioner, Port Authority Trans-Hudson Corporation?

TABLE OF CONTENTS

Page

| | |
|--|-----|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES..... | iii |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT | 1 |
| SUMMARY OF ARGUMENT..... | 3 |
| ARGUMENT | 4 |
| POINT I | |
| THE PORT AUTHORITY IS NOT ENTITLED TO IMMUNITY FROM SUITS IN THE FEDERAL COURTS PURSUANT TO THE PROTECTIONS AFFORDED BY THE ELEVENTH AMENDMENT | 4 |
| POINT II | |
| THE IMMUNITY AFFORDED BY THE ELEVENTH AMENDMENT HAS BEEN WAIVED BY OR ON BEHALF OF THE PORT AUTHORITY TRANS-HUDSON CORPORATION..... | 13 |
| CONCLUSION | 16 |

TABLE OF AUTHORITIES

Page

CASES CITED

| | |
|---|--------------------|
| AMOCO Production Co. v. Gambell, 480 U.S. 531 | 14 |
| Atascadero State Hospital v. Scanlon, 473 U.S. 234 | 15 |
| Edelman v. Jordan, 415 U.S. 651 | 11 |
| Ford Motor Company v. Department of Treasury of the State of Indiana, 323 U.S. 459..... | 11 |
| Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 | 2, 4, 5, 9, 10, 11 |
| Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274..... | 4 |
| 1930 Report of the Att'y Gen 124..... | 7, 11 |
| People v. Port of New York Authority, 64 Misc. 2d 563..... | 9 |
| United States v. James, 478 U.S. 597 | 13 |
| Welch v. Texas Department of Highways and Public Transportation, 483 U.S. 468 | 15 |
| Will v. Michigan Department of State Police et al., 491 U.S. | 5 |

UNITED STATES CONSTITUTION CITED

| | |
|--------------------------|----------------------------|
| Eleventh Amendment | 1, 3, 5, 9, 10, 11, 12, 15 |
|--------------------------|----------------------------|

STATUTES CITED

| | |
|---|---------|
| Federal Employer's Liability Act 45 U.S.C. § 51 et seq | 2 |
| N.Y. Unconsol. Laws (McKinney 1979) | |
| N.Y. Unconsol. Laws 6401 (McKinney 1979) | 1, 2, 3 |
| N.Y. Unconsol. Laws 6404 (McKinney 1979) | 1, 5 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|----------------------|
| N.Y. Unconsol. Laws 6406 (McKinney 1979) | 6 |
| N.Y. Unconsol. Laws 6407 (McKinney 1979) | 6, 8, 10 |
| N.Y. Unconsol. Laws 6408 (McKinney 1979) | 11 |
| N.Y. Unconsol. Laws 6416 (McKinney 1979) | 12 |
| N.Y. Unconsol. Laws 6459 (McKinney 1979) | 11 |
| N.Y. Unconsol. Laws 6466 (McKinney 1979) | 8 |
| N.Y. Unconsol. Laws 6612 (McKinney 1979) | 8 |
| N.Y. Unconsol. Laws 6951 (McKinney 1979) | 8 |
| N.Y. Unconsol. Laws 7002 (McKinney 1979) | 7 |
| N.Y. Unconsol. Laws 7031 (McKinney 1979) | 7 |
| N.Y. Unconsol. Laws 7053 (McKinney 1979) | 7 |
| N.Y. Unconsol. Laws 7101 (McKinney 1979) | |
| | 2, 4, 13, 14, 15, 16 |
| N.Y. Unconsol. Laws 7106 (McKinney 1979) | |
| | 2, 4, 13, 14, 15, 16 |
| RULE CITED | |
| Fed. R. Civ. P. 12 (c)..... | 2 |
| OTHER AUTHORITIES CITED | |
| Blacks Law Dictionary (West Pub. Co. 1968)..... | 14 |
| Comprehensive Annual Financial Report of the Port Authority of New York and New Jersey for the Year Ended December 31, 1987 | 7, 9 |
| Webster's New Collegiate Dictionary (G & C Mer- riam Co. 1979) | 14 |

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The doctrine of Sovereign Immunity is based upon the Eleventh Amendment to the Constitution of the United States, and provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Portions of the legislation establishing and governing the Port Authority of New York and New Jersey, N.Y. Unconsol. Laws § 6401 et seq. (McKinney 1979) are set forth in the Pet. App., A51-A55. Other portions of the legislation are set forth in the Appendix to the Brief of the petitioner (A1-A14). Additional portions of the legislation, specifically relied upon herein, are reproduced in the Appendix to this Brief (A1-A11).

STATEMENT

The Port Authority of New York and New Jersey was created in 1921 by an interstate Compact between the states of New York and New Jersey, as "a body corporate and politic". N.Y. Unconsol. Laws section 6404 (McKinney 1979) (Pet. App., A51) The Port Authority Trans-Hudson Corporation ("PATH") is a wholly-owned subsidiary of the Port Authority and operates railroad and rail facilities, as well as various other facilities including bridges, tunnels, air terminals and other mass transportation facilities. Respondents Feeney and Foster instituted their actions for damages for personal injuries allegedly

sustained in the course of their employment, pursuant to the Federal Employer's Liability Act 45 U.S.C. § 51 et seq. and other related sections.

PATH moved to dismiss the complaints in both cases, pursuant to FED. R. CIV. P. 12(c) seeking an order of dismissal of the complaint due to a lack of subject matter jurisdiction, in that PATH cannot be sued in a Federal Court pursuant to the dictates of the Eleventh Amendment. Both motions were granted by the district court, and the Court of Appeals for the Second Circuit reversed, finding that the Port Authority is not a state agency as far as Eleventh Amendment purposes are concerned, and alternatively, that even were it to be considered a state agency, it had specifically waived its Eleventh Amendment immunity. (Pet. App., A10-A21). The court reasoned that, under the authority of *Lake Country Estates, Inc. v Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), a political subdivision does not necessarily enjoy the Eleventh Amendment immunity a state enjoys, and that PATH is a municipal corporate instrument, that was self-sustaining and performed many local functions. (Pet. App., A-13). In applying the various criteria found in *Lake Country Estates*, the Second Circuit found most persuasive the fact that a judgment against PATH would not put the state treasury of either New York or New Jersey at risk (Pet. App., A-14).

On the issue of waiver, the Second Circuit determined that PATH had waived its Eleventh Amendment immunity pursuant to sections 7101 and 7106 N.Y. Unconsol. Laws (McKinney 1979). (Pet. App., A16-A18).

A petition for rehearing containing a suggestion that the action be reheard in banc was filed by the Petitioner. The petition for a rehearing was denied and the suggestion for rehearing in banc was transmitted to the judges of the court and no judge requested that any vote be taken. (Pet. App., A1-A2).

SUMMARY OF ARGUMENT

The decision of the Second Circuit below was based upon the finding that; first, the Port Authority is not an agency of the state and accordingly is not to be afforded the immunity of the Eleventh Amendment; and second, assuming for the moment that the Port Authority enjoys Eleventh Amendment immunity, nevertheless it has been waived.

As to the finding that the Port Authority is not a state agency for Eleventh Amendment immunity purposes, reference to the various sections of the legislation establishing and governing the Port Authority (N.Y. Unconsol. Laws § 6401 et seq. McKinney 1979) support the finding of the court below that the Port Authority is not entitled to the immunity afforded by the Eleventh Amendment. The Eleventh Amendment applies only to states and does not apply to political subdivisions or municipal corporate entities such as the Port Authority. Further, The Port Authority is self-sustaining, operates independently of the states of New York or New Jersey, and any judgment obtained against the Port Authority would not be enforceable against the state treasury.

On the second issue, the concept of waiver, the Port Authority has specifically consented to be sued, in a broadly worded consent statute N.Y. Unconsol. Laws section 7101 (McKinney 1979) and further has *specifically* consented to the courts of the *United States* as a proper forum for such suits (N.Y. Unconsol. Laws section 7106 McKinney 1979) This language has only one plain and unequivocal meaning: the U. S. District Court is a proper forum for suits against the Port Authority. To find otherwise goes against the plain and obvious meaning of the statutes and the ordinary and everyday meaning accorded to such language.

ARGUMENT

POINT I

THE PORT AUTHORITY IS NOT ENTITLED TO IMMUNITY FROM SUITS IN THE FEDERAL COURTS PURSUANT TO THE PROTECTIONS AFFORDED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment prohibits a state from being sued in the Federal Court. However, the protection of the Eleventh Amendment does not extend to political subdivisions or municipal corporations. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, at 280. Further, as this Court recently stated in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), just because the approval of Congress is required regarding the establishment of a Compact, such as between the states of New York and New Jersey, that set up the Port Authority, does not mean that the Port Authority automatically gets the

same immunity that is afforded either of the states. This court stated that the Eleventh Amendment protection is available *only* to one of the United States. If one of the states creates an agency that is comparable to a county or a municipality, there is no Eleventh Amendment immunity (at 401). This court went on to state that it has "consistently refused" to extend the protections of the Eleventh Amendment to political subdivisions even though such entities might exercise a "slice of state power." (at 401). Without "good reason" to believe that the agency or political sub-division was intended to enjoy the special protections of the Eleventh Amendment that the creating states, in this case, New York and New Jersey, themselves enjoy, and further that the Congress of the United States concurred in that purpose, then there is "no justification" for extending the specifically-worded limitations of the Eleventh Amendment that restrict its protections to "one of the United States". (at 401).

Using the rules and guidelines of this Court in *Lake Country Estates*, it is clear that the Port Authority does not enjoy the immunity provided by the Eleventh Amendment. Further, reference to the statutes regulating, establishing and controlling the Port Authority clearly establish that the Port Authority is not an agency of the state. Section 6404 (Pet. App., A-51) describes the Port Authority as a "body corporate and politic". This section does not state that the Port Authority is to assume the identity of a state agency, with the rights and immunities that an agency enjoys. Most recently, in *Will v. Michigan Department of State Police et al.*, 491 U.S. ____ (June 15, 1989), this Court examined the legal and long-standing definition of "bodies politic and corporate" and stated

that it means "corporations, both private and public (municipal), and (is) *not to include the States.*" (emphasis supplied).

Other sections of the legislation clearly establish that the Port Authority is to be considered an independent corporate entity, separate and apart with specific functions, duties, powers and responsibilities particularly unique to it. Section 6407 (Pet. App., A-52) states that the Port Authority "shall constitute a body, both corporate and politic, with full power and authority . . . ". Under this section, the Port Authority has the power to construct, lease, and operate any terminal or transportation facility, to purchase, to "make charges for the use thereof", as well as to own, hold, lease, and operate real property and personal property, as well as the authority to borrow money, and issue bonds and mortgages. In short, the Port Authority is an independent corporate body which has the sole and independent power, discretion and authority to operate various facilities, whether they be railroad, marine and air terminals or other transportation facilities, *independently* of the states of New York and New Jersey.

Pursuant to sections 6406 N.Y. Unconsol. Laws (McKinney 1979) (A1), the commissioners of the Port Authority constitute a board and are empowered to adopt by-laws "for its management". Neither the state of New York nor New Jersey issue any laws, rules or regulations regarding the operation of the Port Authority or any of its facilities. In its own eyes, the Port Authority describes itself as an independent, self-sustaining and self-supporting entity:

"Unlike many other authorities and governmental agencies, the Port Authority, by law, must be self-supporting. It has neither the power to tax nor the right to pledge the credit of either state in support of its general obligations.

The Port Authority pays its own way for operations and capital investment, pooling revenues earned from its facilities through rents, fees, fares, tolls and other user charges. It finances new construction, major improvements and repairs by selling its bonds and other obligations. *Comprehensive Annual Financial Report of the Port Authority of New York and New Jersey for the Year Ended December 31, 1987*, p.10."

Not only does the Port Authority "pay its own way" but pursuant to section 7002 (Brief for Petitioner at A8) the Port Authority places its surplus revenues, into a general reserve fund. The Port Authority is empowered to pledge these monies as security for bonds that are issued in its own name. Pursuant to section 7031 N.Y. Unconsol. Laws (McKinney 1979) (A8) not only is the Port Authority empowered to issue its own bonds, but by law, both the states of New York and New Jersey agree that any bond issued by the Port Authority is deemed to be a negotiable instrument. Further, it has been held that such bonds issued by the Port Authority are not to be considered obligations of the state of New York. (see 1930 Report of the Att'y Gen 124). Under section 7053 N.Y. Unconsol. Laws (McKinney 1979) (A9), bonds issued by the Port Authority are the "direct and general obligations of the port authority" and to be secured by the general reserve fund referred to previously. Thus it becomes clear that the Port Authority is not only self-sufficient but self-supporting and operates independently of either the states of

New York or New Jersey. Certainly it cannot be considered an agency for Eleventh Amendment purposes.

Under § 6951 (N.Y. Unconsol. Laws McKinney 1979) (A7), the Port Authority is empowered to sell real property *in its own name*, and issues bargain and sale deeds that are executed by the chairman or vice chairman or other officers of the Port Authority and "attested by the Secretary thereof." Pursuant to § 6407 (Pet. App., A-52) the Port Authority is also empowered to own, hold, lease and/or operate real or personal property. In addition, pursuant to § 6612 (A4), any facility owned, controlled or operated by the Port Authority is exempt from and beyond the control of either State or any agency, commission or municipality of the States. This section provides that all details regarding "financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and services" of various facilities of the Port Authority "shall be within its sole discretion and its decision." The section further provides that such decisions "shall be controlling and conclusive." (A4)

As further indicia of the non-agency status of the Port Authority, § 6466 (N.Y. Unconsol. Laws McKinney 1979) (A2), provides that the Port Authority is entitled to bring lawsuits *in its own name*, "in an appropriate court having jurisdiction." The section further empowers the legal representative of the Port Authority to "begin such action or proceeding" and does not restrict the Port Authority to suits *only* in the State of New York. The section states that the action "may be brought in the supreme court of this state" and thereby gives to the Port Authority the option of suing in the Federal Court. Not

only does this section provide further support to respondents' position that the Port Authority is not an agency of the States for Eleventh Amendment purposes, but it also creates a somewhat difficult position for the petitioner to claim, on the one hand, that the Port Authority cannot be sued in the Federal Courts, while on the other hand, this section allows the Port Authority to sue as a plaintiff in the Federal Courts.

As further support for the position of the respondents, that the Port Authority is not entitled to Eleventh Amendment immunity, is the fact that even the State of New York, in suing the Port Authority *in its own name*, considers the Port Authority an independent entity or municipal corporation. In *People v. Port of New York Authority*, 64 Misc. 2d 563, the Attorney General of the State of New York brought an action against the Port Authority claiming violations of the public health law. Certainly, the petitioner cannot be heard to argue that the State of New York would sue one of its own agencies. In *Lake Country Estates*, this Court pointed to litigation between the State of California and the TRPA as further proof of the fact that the TRPA was not an agency or arm of the State, and hence not entitled to Eleventh Amendment immunity (at 402). Likewise, since the Port Authority has described itself as "self-supporting", "pays its own way" as discussed above (see Comprehensive Annual Financial Report) it becomes clearer and clearer as the various statutes establishing and governing the Port Authority are reviewed, that the Port Authority is not an agency of arm of either the State of New York or New Jersey, that it functions independent of and exercises the powers of an independent entity such that it is not

entitled to the protections of the Eleventh Amendment immunity.

In *Lake Country Estates*, this Court rejected the over-expansive reading of the Eleventh Amendment that had been decided by the Ninth Circuit. This Court rejected the reasoning that Eleventh Amendment immunity should apply to every bi-state agency unless the immunity of that agency were expressly waived. This Court stated "we cannot accept such an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to 'one of the United States.'" If an examination of the compact that set up the Port Authority discloses that the Port Authority is comparable to a county or municipal corporation, then it has no Eleventh Amendment immunity. This is precisely what has been described above. The Port Authority exercises such diverse powers, controls and activities wholly independent of the control of the State that it cannot be considered an agency of the State and is more comparable to a county or municipal corporation. The Court has time and time again indicated that the control of local land areas has traditionally been the function of a county or municipality. As indicated by the discussion above, the Port Authority exercises such control over the operation, management, sale, purchase, issuance of bonds and the like of all facilities within the Port Authority district that it cannot be considered an agency, and operates more as a municipal corporate entity, which is precisely how it is described in the governing statutes (see, for example, § 6407) (Pet. App., A-52).

The determining factor in *Lake Country Estates*, was the insulation of the State Treasury from any judgments against the TRPA.

In order to determine whether or not the Port Authority is an agency of the State, this Court had traditionally looked to the real effect of a judgment being obtained against the agency. The real question thus becomes: is the State Treasury responsible for a judgment obtained against the Port Authority? Thus, where there was any doubt as to whether or not Eleventh Amendment immunity was applicable, this Court has focused upon whether or not the State Treasury is responsible for a judgment, in determining the issue (see, for example, *Edelman v. Jordan*, 415 U.S. 651; see also, *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U.S. 459). In the case of the Port Authority, the State Treasury is not responsible for a judgment and therefore, while the Port Authority may be, from the petitioner's point of view, considered a political subdivision, it is nonetheless not an agency of the State and exercises such independence that it is not entitled to Eleventh Amendment immunity. Pursuant to § 6408 (N.Y. Unconsol. Laws McKinney 1979) (Pet. App., A-52), the Port Authority "shall not pledge the credit of either State."

As discussed earlier, bonds issued by the Port Authority are not obligations of the State (1930 report of Att'y Gen. 124). In addition, § 6459 (Pet. App., A-54) specifically provides that the Port Authority "shall have no power to pledge the credit of either State or to impose any obligation upon either State . . . except as and when such power is expressly granted by statute or the consent by any such municipality is given." It thus becomes clear

that the State Treasury is insulated from actions by or against the Port Authority. Finally, § 6416 (Pet. App., A-53) specifically limits the amount that the State shall appropriate, to \$100,000.00, and further limits that appropriation to be used for salaries, office expenses and "other administrative expenses." The section further only requires this appropriation for office expenses and salaries until such time as the revenues from the operations of the Port Authority are adequate to meet its own expenditures. Not only is this appropriation an "optional obligation" as described by the Court below (Pet. App., A-15), as the Second Circuit went on to state, this optional obligation was limited to a "very narrow category of expenses" and thus the State Treasury was insulated not only from the "bulk" of the petitioner's operating expenses but also from personal injury judgments. There is nothing contained in the statutes cited by the petitioner which supports the argument that the State Treasury is exposed to a personal injury judgment. In fact, the legislation is so carefully drawn that the State Treasury is specifically insulated.

From the foregoing, it is submitted that it is clear that the Port Authority is an independent, self-sufficient entity that has vast powers reserved to itself, which is empowered to buy, sell, lease land, to issue bonds, to borrow money, perform a whole host of other functions and exercises such control over its own operations that it cannot be considered an agency of the State as far as Eleventh Amendment immunity is concerned.

POINT II

THE IMMUNITY AFFORDED BY THE ELEVENTH AMENDMENT HAS BEEN WAIVED BY OR ON BEHALF OF THE PORT AUTHORITY TRANSHUDSON CORPORATION

Pursuant to § 7101 (N.Y. Unconsol. Laws McKinney 1979) (Pet. App., A-54), the States of New York and New Jersey consent to suits "of any form or nature at law, in equity or otherwise" against the Port Authority. Further, pursuant to § 7106 (N.Y. Unconsol. Laws McKinney 1979) (Pet. App., A-54) the foregoing consent is conditioned upon such a suit against the Port Authority being brought "within a county or a judicial district, established by one of said states *or by the United States.*" (emphasis added) The only requirement of § 7106 is that the action be brought within the Port of New York District.

The personal injury actions instituted by both respondents were commenced in the Southern District of New York, a District Court established by the United States, and located within the Port of New York District. Nonetheless, the petitioner argues that the term "United States" does not mean a District Court such as the Southern District of New York. Pursuant to § 7106, the Port Authority is deemed to be a resident of the Judicial District encompassed by the Southern District. Petitioner argues that the term "United States" in § 7106 does not mean what it appears to mean, without telling us why.

One of the pitfalls of unrestrained legal argument is loss of perspective. One can become so enmeshed in legal argument that the plain meaning of the English word becomes clouded. As this Court stated in *United States v.*

James, 478 U.S. 597: “[T]he starting point in statutory interpretation is ‘the language [of the statute] itself.’ (citations omitted) [W]e assume that the legislative purpose is expressed by the ordinary meaning of the word used.” (at 604) This Court went on to state that when the language of a statute becomes unambiguous, “judicial inquiry is complete”, except in rare instances (at 606). In *AMOCO Production Co. v. Gambell*, 480 U.S. 531, this Court stated that when the statutory language is plain, going behind such plain language is a step that should be taken “‘cautiously even under the best of circumstances.’” (at 553).

Black's Law Dictionary (West Publishing Co. 1968) defines “Federal Courts” as “the courts of the United States” (at p. 740). The term “Courts of the United States” is further defined to include the “District Courts” (at p. 435). *Webster's New Collegiate Dictionary* (G & C Merriam Co. 1979) defines “Federal District Court” as “a district trial court of law and equity that hears cases under federal jurisdiction”. The term “Federal Court” is defined as: “a court established by authority of a federal government; esp: one established under the constitution and laws of the U.S.” (at 416). It is submitted that the plain meaning of the term “United States” found in § 7106 means the District Courts, including the Southern District of New York, which lie within the Port Authority District. And § 7101 does not restrict cases against the Port Authority to specific categories. In fact, that section specifically states that suits “of any form or nature at law” are authorized (emphasis supplied). It flies in the face of

good sense and reason to contend, that the plain language of Sections 7101 and 7106 do not permit suits to be brought against the Port Authority in the Federal Court.

In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987), the Court stated that a State may waive its immunity and consent to suit in Federal Court, provided such waiver is indicated by express language. However, the question of express waiver was not before the Court in that case, and accordingly, the Court had no occasion to rule upon it. The Court, however, did state that if a State “waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment.” (citation omitted) (at 473). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, the Court stated that the waiver by a State of its immunity is a well-established exception to the protections afforded by the Eleventh Amendment. Under such circumstances, an action against the State is not barred by the Eleventh Amendment. The Court went on to require that such a waiver be by “the most express language.” (at 240) Where, as here, the State waives its immunity and indicates a “willingness to be sued in federal court” (at 241) the waiver will be sustained and the protection of the Eleventh Amendment will not be applicable. Section 7106 clearly specifies that the Port Authority can be sued in the Federal Court when the language “established by one of said states or by the United States, and situated wholly or partially within the Port of New York District” is used. Clearly, the language of § 7101 and § 7106 meet the requirements of this Court as stated in *Welch* and *Atascadero*; the waiver is clear, unambiguous, contained in

express language, and leaves no room for any other logical explanation. Certainly, there can be no other "reasonable construction" to be applied to the clear import of these sections. The Port Authority consents to suits of any kind or nature, as long as they are brought in either the State or Federal Court that lies within the Port Authority District. The actions brought by the respondents in the Southern District of New York clearly meet the requirement of Sections 7101 and 7106 and accordingly, the decision of the Second Circuit should be affirmed.

CONCLUSION

The orders of the Court of Appeals for the Second Circuit should be affirmed.

DATED: ISLIP, NEW YORK
January 15, 1990

Respectfully submitted,

RICHARD W. MILLER
Counsel of Record

PETER M. J. REILLY
Attorney for Respondents
PATRICK FEENEY
and CHARLES T. FOSTER
444 Main Street/P.O. Box 230
Islip, New York 11751
(516) 581-8687

On the Brief: RICHARD W. MILLER

§ 6406. Board of commissioners; by-laws

ARTICLE V

The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

§ 6459. Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

The port of New York authority¹ is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all federal agencies, including the interstate commerce commission, the war department, and the United States shipping board, for suitable assistance in carrying out said plan. It shall cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said comprehensive plan. It shall render such advice, suggestion and assistance to all

¹ Now the Port Authority of New York and New Jersey.
See section 6404.

municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan. All municipalities within the district are hereby authorized and empowered to cooperate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to cooperate. The bonds or other securities issued by the port authority shall at all times be free from taxation by either state. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given.

§ 6466. Actions to enforce laws and orders; jurisdiction of courts

Whenever the port authority shall be of the opinion that any person, association or corporation subject to its jurisdiction is failing or omitting, or about to fail or omit to do anything required of it by the laws governing the development and regulation of the port of New York, or by its order, or is doing or is about to do anything, or permitting, or about to permit anything to be done contrary to, or in violation of, such law or orders, it shall direct its legal representative to commence an action or proceeding in the name of the port authority, in an appropriate court having jurisdiction, for the purpose of having such violations, or threatened violations, stopped and prevented either by mandamus or injunction. Such an

action or proceeding may be brought in the supreme court of this state, and the said court shall have and is hereby given the necessary and appropriate jurisdiction to grant mandamus or injunction, as the case may require, or any other relief appropriate to the case.

Failure of such person, association or corporation to notify the port authority, as required in the preceding section, of its acceptance of and willingness to obey any order of the port authority shall be and be deemed to be prima facie proof that such person, association or corporation is guilty of such violation, or threatened violation. The legal representative of the port authority shall begin such action or proceeding by a petition to the appropriate court, alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. If the petition is directed to a court of this state, it shall thereupon be the duty of the court to specify the time, not exceeding twenty days after the service of a copy of the petition, within which the person, association or corporation complained of must answer the petition. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances, in such manner as the court shall direct, without other or formal pleadings and without respect to any technical requirement. Such other persons, associations or corporations as the court shall deem necessary or proper to join as parties, in order to make its order, judgment or writs effective, may be joined as parties upon application of the legal representative of the port authority. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that a writ of mandamus, or an injunction, or both, issue as prayed for

in the petition, or in such modified or other form as the court may determine will afford the appropriate relief.

§ 6612. General powers; local laws; subsidiary corporation

All details of the effectuation, including but not limited to details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service, of the world trade center, the Hudson tubes and the Hudson tubes extensions by the port authority shall be within its sole discretion and its decision in connection with any and all matters concerning the world trade center, the Hudson tubes and the Hudson tubes extensions shall be controlling and conclusive. The local laws, resolutions, ordinances, rules and regulations of the city of New York shall apply to such world trade center if so provided in any agreement between the port authority and the city and to the extent provided in any such agreement.

So long as any facility constituting a portion of the port development project shall be owned, controlled or operated by the port authority (either directly or through a subsidiary corporation incorporated for any of the purposes of this act¹), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall any such agency, commission or municipality have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the port authority (or such subsidiary corporation) including but not limit to the transfer of all or any portion thereof

to or by the port authority (or such subsidiary corporation).

Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions

¹ Sections 6601 to 6618.

and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but not limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act² and chapter three hundred one of the laws of New York of nineteen hundred fifty³ and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one⁴ as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

Whenever any state, municipality, commission, agency, officer, department, board or division is authorized and empowered for any of the purposes of this act to co-operate and enter into agreements with the port authority or to grant any consent to the port authority or to grant, convey, lease or otherwise transfer any property

to the port authority or to execute any document, such state, municipality, commission, agency, officer, department, board or division shall have the same authorization and power for any of such purposes to co-operate and enter into agreements with such subsidiary corporation and to grant consents to such subsidiary corporation and to grant, convey, lease or otherwise transfer property to such subsidiary corporation and to execute documents for such subsidiary corporation.

§ 6951. Sale of real property, manner of procedure

Whenever The Port of New York Authority¹ (hereinafter called the Port Authority) shall determine to sell any real property which may have been acquired by the Port Authority by purchase, condemnation or otherwise, pursuant to any of its powers and authorities, but which real property is no longer required for such purposes, the following procedure shall be followed:

- (a) A map shall be made of such real property so determined as no longer required, which map shall be filed in the office of the Port Authority.
- (b) There shall be annexed to such map a certificate executed by the chief engineer of the Port Authority stating that such real property is no longer required for such purposes.
- (c) All or any portion of said real property may be sold at either private or public sale, and all deeds of

² Section 6609.

³ Section 7101 et seq.

⁴ N.J.S.A. 32:1-157 et seq.

¹ Now the Port Authority of New York and New Jersey. See section 6404.

conveyance therefor shall be by bargain and sale and shall be executed by the chairman, or the vice chairman, or the general manager, or an assistant general manager of the Port Authority and attested by the secretary thereof.

§ 7031. Negotiability of instruments unaffected by certain provisions

Upon the concurrence of the state of New Jersey herein, in the manner indicated in section two hereof,¹ the states of New York and New Jersey agree that any bond, note or instrument heretofore or hereafter issued by the port of New York authority² containing a provision that upon the happening of a specified event or events it shall be exchanged for or converted into a general and refunding bond, consolidated bond or note or other negotiable bond, note or instrument of the port of New York authority shall, notwithstanding such provision, be and be deemed to be also a negotiable instrument under the law of each state, provided, that it conforms in all other respects to the requirements for negotiable instruments under the law of such state.

§ 7053. Bonds as direct obligation of authority; security for payment; terms and conditions; redemption

The bonds delivered to the two states pursuant to this act¹ and the concurrent act of the state of New Jersey² shall be direct and general obligations of the port authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof. The payment of the principal and interest thereof shall be secured by the general reserve fund of the port authority, authorized by chapter forty-eight of the laws of New York of nineteen hundred and thirty-one³ and chapter five of the laws of New Jersey of nineteen hundred and thirty-one;⁴ and said general reserve fund shall be pledged as security for the payment of the principal and interest of said bonds and for the fulfillment of other undertakings assumed by the port authority to or for the benefit of the holders of said bonds. Such pledge, however, shall be subject to the right of the port authority to pledge said general reserve fund as security for any other bonds, notes or evidences of indebtedness whatsoever hereafter issued by the authority as security for which it may at the time be authorized to pledge the said general reserve fund, and also subject to the right of the port authority to use the moneys in said general reserve fund to meet, pay or otherwise fulfill any of its obligations under or in connection with any bonds, notes or other evidences of indebtedness as security for which said

¹ Section 7032.

² Now the Port Authority of New York and New Jersey.
See section 6404.

¹ Sections 7051 to 7058.

² N.J.S.A. 32:1-140.1 to 32:1-140.7.

³ Section 7001 et seq.

⁴ N.J.S.A. 32:1-141 et seq.

general reserve fund has heretofore been or is now pledged or for which said general reserve fund may hereafter be pledged. Moreover, no greater rights in or to said general reserve fund shall be granted to or conferred upon the holders of the bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey than have been granted to and conferred upon the holders of general and refunding bonds of the port authority issued pursuant to the resolution of the port authority adopted March eighteenth, nineteen hundred and thirty-five, and amended March twenty-fifth, nineteen hundred and thirty-five and September sixteenth, nine-teen hundred and forty-three.

The bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey shall be dated as of a date not more than thirty days subsequent to the date on which delivery is made or tendered, shall mature forty years from their date, and shall bear interest at the rate of one and one-half per centum per annum. Said bonds shall be subject to redemption at the option of the port authority, in whole or in part, on any interest payment date or dates at one hundred percent of their par value, plus accrued interest to the date set for redemption.

Except as hereinbefore specifically provided, the port authority shall, by resolution, determine the form, characteristics and all other matters in connection with said bonds, including without limiting the generality hereof, the denominations in which they shall be issued, provisions with respect to the exchange of bonds of one denomination into bonds of another denomination, provisions with respect to the issuance of temporary bonds

and the exchange thereof for definitive bonds, provisions with respect to the establishment of a sinking fund or sinking funds and for the use of the moneys in sinking fund to purchase or redeem bonds prior to their maturity, provisions with respect to the place of payment, provisions with respect to notice of redemption, provisions with respect to the paying agent or the registrar and provisions with respect to the method of signature.
